No. 13133

# In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

W. T. GRANT COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


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### JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151 *et seq.*),[1] for enforcement of its order (R. 27–29, 32–33)[2] issued on June 7, 1951, against

[1] The pertinent provisions of the Act are appended hereto (pp. 26–30, *infra*).

[2] References to portions of the printed record are designated "R." Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence. The Board's decision adopted the findings and conclusions of the trial examiner with certain modifications and additions (R. 22–23).

respondent, W. T. Grant Company, following the usual proceedings under Section 10 of the Act. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred at San Jose, California, within this judicial circuit.[3]

## STATEMENT OF THE CASE

## I

### The Board's findings of fact

This case concerns (a) respondent's refusal to bargain with Retail Clerks Union, Local 428, AFL, herein called the Union, after it had been designated as their bargaining representative by a majority of respondent's employees; (b) respondent's efforts to avoid its bargaining obligation by dissipating the Union's majority; and (c) respondent's threat to close its store rather than bargain with the Union concerning a union-shop agreement.

#### A. The Union's selection as bargaining representative of respondent's employees

There is no dispute as to the propriety of the Board's finding that the bargaining unit here consists of all employees at respondent's San Jose store

[3] Respondent, a Delaware corporation, with executive offices in New York, operates approximately 495 retail stores located in 39 States. During the fiscal year ending January 31, 1950, respondent purchased for sale at its San Jose, California store, involved herein, merchandise valued in excess of $100,000, approximately 90 percent of which was shipped to said store from points outside California. Respondent concedes that it is engaged in commerce within the meaning of the Act (R. 36; 9, 13, 65–66). No question of the Board's jurisdiction is presented.

excluding supervisors (R. 36–37; 10, 13). With respect to the Union's majority, the Board found, upon substantial evidence, that of the 39 employees in this unit during the workweek ending January 25, 1950 (R. 148–149), 20 had designated the Union as their bargaining representative between January 4 and January 6, 1950 (R. 23; 79–94, 96–99).[4]

**B. Respondent's refusal to recognize the Union without Board certification based upon a formal hearing**

On January 6, 1950, Kihs, the manager of respondent's San Jose store (R. 37; 152), received from the Union a written request for a bargaining conference (R. 37; 70–71, 169–170). Kihs forwarded the Union's request to Foley, respondent's attorney in New York, who advised the Union that he would arrange a meeting shortly thereafter, which he did (R. 71–72). The meeting was held on January 25 and was attended by Kihs and Foley on behalf of respondent, and by McLoughlin and Lazzaro, secretary-treasurer and business representative, respectively, of the Union (R. 23, 37; 69, 99–100, 112, 114).

McLoughlin proposed that respondent check the Union's authorization cards or employ "any other quick procedure" for ascertaining the Union's majority status, but Foley, adhering to respondent's policy

[4] An additional employee had signed an authorization card for the Union (R. 95), but apparently left respondent's employ before January 25. The trial examiner appears erroneously to have included this employee in arriving at his figure of 21 employees who designated the Union as bargaining agent (R. 37). The trial examiner also inadvertently numbered the working force in the unit at 40 (R. 37).

of requiring a Board election before granting a union's request for bargaining, suggested that the Union file a representation petition with the Board (R. 23, 38; 100–102, 115–116). Accordingly, the Union filed such a petition on January 31 (R. 38; 103, 121–127). Respondent further insisted upon a formal hearing on the petition and refused the Union's request that it consent to an immediate election, notwithstanding the absence of any real issue other than the one to be determined by the election itself (R. 38–39; 69–70, 73–74, 76–78, 108, 117, 120, 121–127).[5]

**C. Respondent's campaign to dissipate the Union's majority while the petition for certification was pending**

Early in February, Manager Kihs, without consulting or notifying the Union, called a meeting of the employees in the store and announced that respondent would grant certain merit wage increases to 23 of the employees and that 13 employees would have their workweek changed from 6 days to 5 days, a change generally favored by the employees (R. 23–24, 39; 108–109, 137, 141–142, 143–144, 152–154, 156).[6] These benefits, together with 8 promotions, with respect to which respondent had also failed to consult the Union, became effective during the workweek ending Febru-

[5] The hearing was held on March 3, and on April 4 the Board issued its order directing the holding of an election (R. 39; 103–107, 121). The election was scheduled for May 3 (R. 39; 110). It was never held, however, because prior to the scheduled date the Union withdrew its petition and filed the unfair labor practice charge herein (R. 39; 108).

[6] At the same time, according to uncontradicted testimony, Kihs told the employees that they did not have to join the Union (R. 141–142, 144).

ary 23 (R. 23–24, 39; 142, 143–144, 146, 152–154). Kihs had never before granted so many wage increases at one time; indeed he could not recall any prior occasion when such increases had been granted on a group basis (R. 39–40; 155–156). Nor did Kihs offer any explanation for his concurrent action in reducing the number of workdays of the 13 employees, although he testified that one of the employees had requested such a change (R. 41; 156–157). The Board affirmed the trial examiner's finding that the bestowal of these benefits had the purpose of discouraging Union affiliation by respondent's employees (R. 23–24, 42).

In March, Employee Putney, who was wearing a Union button while at work, was asked by Mrs. Kleidon, assistant manager of the store (R. 50; 143), whether she was the only girl in the store who belonged to the Union (R. 50; 144). Putney thereupon removed the button (R. 50; 145). In April, Kleidon asked Employee Nix why she still wore her Union button, and Nix thereafter wore the button "on the underneath side" of her sweater (R. 50; 150–151).

#### D. Respondent's further interference, restraint and coercion

On February 11, respondent posted a notice in the San Jose store advising its employees that the Company's open shop policy "will not be changed" (R. 24, 42–43; 138–139). Late in April and on May 1, Manager Kihs showed to numerous employees a letter from respondent's attorney, dated April 27, and written in reply to an inquiry by Kihs relating to the union shop problem. The attorney stated his

belief that it had been "settled Company policy that we will not operate a union shop in San Jose or elsewhere," but added that "in order to make assurance doubly sure" he had cleared the matter with a Company official and found that "we can take a definite position to the effect that we will not agree to a union shop under any circumstances," and that "if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose" (R. 24–25, 43–44; 138, 140–141, 145–146).[7]

## II

### The Board's conclusions of law

Upon the above findings, the Board concluded that respondent had engaged in unfair labor practices contravening Sections 8 (a) (1) and (5) of the Act. In thus affirming the trial examiner, the Board unanimously held that respondent's interrogation of its employees concerning union membership and its unilateral grant of benefits to its employees with the intent to discourage union membership interfered with, restrained and coerced the employees in the exercise of their rights under Section 7 of the Act, thereby violating Section 8 (a) (1) (R. 23–24, 42, 51). The Board also unanimously concluded, in view of these unfair labor practices, that "Respondent's insistence upon a Board election was not motivated by a good faith doubt concerning the Union's majority

[7] One employee construed the letter as a threat to close the store rather than permit unionization of the employees (R. 48; 138). Another employee appears to have construed the letter as a threat to maintain a closed nonunion shop (R. 146).

status, but rather by a desire to gain time to undermine the Union and destroy its majority," and that therefore respondent's refusal to bargain with the Union since January 25, 1950, violated Section 8 (a) (5) of the Act (R. 23–24, 52–53). The Board also found that respondent's unilateral grant of benefits constituted an independent violation of Section 8 (a) (5) of the Act even without regard to respondent's purpose (R. 24, n. 4).

Finally, the Board, one member dissenting, affirmed the trial examiner's conclusion that under all of the circumstances, the notice of February 11 and the subsequent letter, embodying a threat to close the store rather than accede to a union shop, evinced a fixed determination not to bargain with respect to a subject of compulsory bargaining and coerced the employees in the exercise of their rights under Section 7, in violation of Section 8 (a) (1) of the Act (R. 24–26, 46–49).

## III

### The Board's order

The Board directed respondent to cease and desist from refusing to bargain with the Union; from conferring benefits on its employees for the purpose of inducing them to refrain from union affiliation and activities; from interrogating its employees concerning their union activities; from threatening to close its San Jose store rather than accede to a union shop; and from in any other manner interfering with, restraining and coercing its employees in the exercise

of their rights under Section 7 of the Act. It affirmatively directed respondent to bargain with the Union upon request, and to post appropriate notices (R. 27–29, 32–33).

## SUMMARY OF ARGUMENT

The Board's findings that respondent interfered with and coerced its employees, in violation of Section 8 (a) (1) of the Act, by unilaterally conferring benefits on them and interrogating them with respect to union membership are supported by substantial evidence on the record considered as a whole. This evidence, including the timing and unprecedented nature of respondent's action, without satisfactory explanation therefor, shows that the action was designed to discourage membership in the Union.

Substantial evidence supports the Board's finding that respondent violated its bargaining obligation by refusing to recognize the Union on January 25 without a Board election. This refusal was not motivated by a genuine doubt of the majority status, which the Union in fact enjoyed, but by a desire to gain time to undermine the Union and destroy its majority. Moreover, the unilateral grant of benefits constituted an independent violation of Section 8 (a) (5) even without regard to motive.

The Board properly found that respondent violated Section 8 (a) (1) by threatening to move its business elsewhere rather than accede to a union shop. Such threat tended to undermine the confidence of the employees in the Union and to discourage membership therein. The fact that the employees had not voted to authorize a union shop at the time of the threat, in

accordance with the then current provisions of Sections 8 (a) (3) and 9 (e) of the Act, is immaterial to the question whether the employees were coerced thereby. The threat not only made a fair referendum impossible, but foreclosed future bargaining on the subject of a union shop under any circumstances.

## ARGUMENT

### I

**Substantial evidence on the record considered as a whole supports the Board's findings that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act by interrogating them with respect to their union affiliation and by unilaterally conferring benefits on them for the purpose of discouraging such affiliation**

The Board's finding that respondent's grant of wage and hour benefits (pp. 4–5, *supra*) was designed to discourage the union affiliation of its employees is amply supported by the whole record. As has been shown, these benefits were announced approximately one month after the Union's request for recognition as bargaining agent, and within two weeks after the Union, upon respondent's refusal to recognize it without a Board election, had filed its petition for certification with the Board. Thus, the benefits came hard upon the heels of the Union's successful organizing campaign, and at a "crucial time" when a shift in employee attitude could still avert the need to bargain with the Union. Cf. *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732, 739, 742 (C. A. D. C.), certiorari denied, 341 U. S. 914; *N. L. R. B.* v. *Ellis-Klatscher & Co.*, 142 F. 2d 356, 358–359 (C. A. 9); *N. L. R. B.* v. *Jahn & Ollier Engraving Co.*, 123 F. 2d

589, 593 (C. A. 7). On these facts alone the Board was warranted in attributing the granting of the benefits to more than mere coincidence. In addition to the convenient timing of the benefits, however, the record shows that the widespread scale on which they were awarded was entirely unprecedented, that respondent had no explanation for reducing the number of workdays, and that respondent, demonstrating its hostility to the Union, followed up this action with unlawful interrogation of its employees concerning their union membership (*supra*, p. 5).[8]

In the circumstances the Board had every reason for rejecting respondent's claim that the purpose of the wage increases was only to reach its competitors' wage level (R. 23–24, 39–42). Promises of economic benefits unilaterally made prior to an election, even when unaccompanied by other unfair labor practices, have been held sufficient to warrant an inference by the Board that the employer's action was taken for the purpose of discouraging employees' interest and activity in the union. *N. L. R. B.* v. *Bailey Co.,* 180 F. 2d 278, 279–280 (C. A. 6). Actual granting of unilateral wage and hour benefits "suddenly and without explanation" (R. 40–41) during a union's organization campaign indicates a purpose to interfere with the employees in the exercise of

[8] Not without significance was respondent's use of the occasion on which the benefits were announced for the purpose of advising the employees that it was not necessary for them to join the Union (R. 141–142, 144). *N. L. R. B.* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 756–757 (C. A. 7); cf. *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732, 739 (C. A. D. C.), certiorari denied, 341 U. S. 914.

their rights under Section 7 of the Act, especially when it occurs in a context of other antiunion activity (*F. W. Woolworth Co.* v. *N. L. R. B.,* 121 F. 2d 658, 660 (C. A. 2), and hence "bears no shield of privilege" (*Joy Silk Mills, Inc.,* v. *N. L. R. B.,* 185 F. 2d 732, 736–737, 739, 742 (C. A. D. C.) certiorari denied, 341 U. S. 914).[9] As this Court stated in a related situation, respondent's conduct "would naturally weaken the position of the Union in any further bargaining for a collective agreement * * *; the [respondent] could * * * reasonably anticipate that [its action] would * * * make the Union 'lose face' with its members." *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n,* 122 F. 2d 368, 377.

The Board properly found (R. 24) that respondent's interrogation of Employees Putney and Nix concerning the union membership of its employees, while the employees were awaiting the opportunity to register their choice by secret ballot (*supra,* pp. 4, 5), was equally violative of Section 8 (a) (1) of the Act and indicative of respondent's purpose to debilitate the Union. *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, 518; *N. L. R. B.* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 327; *N. L. R. B.* v. *Holtville Ice and Cold Storage Co.,* 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.,* 140 F. 2d 243, 245 (C. A. 9); *N. L. R. B.* v. *Security Warehouse & Cold Storage*

[9] Accord, *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 245 (C. A. 9); *Idaho Potato Growers* v. *N. L. R. B.*, 144 F. 2d 295, 310 (C. A. 9), certiorari denied, 323 U. S. 769; *N. L. R. B.* v. *Wytheville Knitting Co.*, 175 F. 2d 238, 239 (C. A. 3); *N. L. R. B.* v. *Winona Textile Mills, Inc.*, 160 F. 2d 201, 207 (C. A. 8).

*Co.,* 136 F. 2d 829, 833 (C. A. 9); *N. L. R. B.* v. *J. G. Boswell Co.,* 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B.* v. *National Plastic Products Co.,* 175 F. 2d 755, 760 (C. A. 4).

Contrary to respondent's contention, "the aroma of coercion" generated by such interrogation (*Joy Silk Mills, Inc.* v. *N. L. R. B.,* 185 F. 2d 732, 743 (C. A. D. C.), certiorari denied, 341 U. S. 914) is not dissipated by the allegedly "friendly" manner of the interrogators. *N. L. R. B.* v. *William Davies Co.,* 135 F. 2d 179, 181 (C. A. 7), certiorari denied, 320 U. S. 770. It is "not necessary to show duress but only interference, and it is not necessary that the interference shall be successful in preventing organization." *Rapid Roller Co.* v. *N. L. R. B.,* 126 F. 2d 452, 457 (C. A. 7), certiorari denied, 317 U. S. 650.[10] In any event, the fact that the employees questioned forthwith removed their union buttons (*supra,* p. 5) furnishes potent evidence that they were in fact coerced, and thus graphically supports the Board's position that "The employee who is interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union activities, but also contemplates some form of reprisal once this information

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[10] Accord, *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 588; *N. L. R. B.* v. *Donnelly Garment Co.,* 330 U. S. 219, 231; *Joy Silk Mills, Inc.* v. *N. L. R. B.,* 185 F. 2d 732, 743–744 (C. A. D. C.), certiorari denied, 341 U. S. 914; cf. *N. L. R. B.* v. *Walt Disney Productions,* 146 F. 2d 44, 49 (C. A. 9), certiorari denied, 324 U. S. 877; *N. L. R. B.* v. *J. G. Boswell Co.,* 136 F. 2d 585, 595–596 (C. A. 9); *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n,* 122 F. 2d 368, 376 (C. A. 9).

is obtained." *Standard-Coosa-Thatcher,* 85 NLRB 1358, 1361, cited with approval in the *Joy Silk Mills* case, *supra,* at 743: accord, *N. L. R. B.* v. *Alco Feed Mills,* 133 F. 2d 419, 421 (C. A. 5).

II

**Substantial evidence on the record considered as a whole supports the Board's finding that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) of the Act**

Respondent refused to recognize the Union as the employees' bargaining representative unless the Union was certified pursuant to a Board-conducted election (*supra.* pp. 3–4). The facts relating to respondent's interference with and coercion of its employees (Point I, *supra*) support the Board's finding that respondent's insistence upon a Board election was not motivated by a good faith doubt of the Union's majority status, but on the contrary by a desire to gain time to undermine the Union and destroy its majority (R. 23–24, 52–53).

It goes without saying, as the Board acknowledged (R. 23), that an employer may refuse recognition and insist upon an election when motivated by an honest doubt of the union's majority status. But, as was said in *Joy Silk Mills, Inc.* v. *N. L. R. B.,* 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914:

> When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in Section 8 (a) (5) of the Act. [Citing cases.] The Act

> provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate agent with which to bargain. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union.

See also, to the same effect, *N. L. R. B.* v. *Star Beef Co.,* decided December 17, 1951 (C. A. 1), 29 LRRM 2190, 2194.

We submit that an employer who had a good faith doubt as to a union's majority status would not coerce his employees while the representation question was awaiting resolution by the Board. He would not interrogate the employees concerning their union sympathies, but would permit them freely to express their choice in the pending secret election, particularly when the employer himself had insisted on the election in order to ascertain the desires of the employees. Nor would an employer who had an honest doubt of the union's majority status unilaterally confer favors on the employees pending determination of the question, since the natural tendency of such favors is to wean the employees away from the union "by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Depart-*

*ment Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, 385 (*supra*, pp. 9–11).

Any doubt respondent may have entertained concerning the Union's majority status would have been resolved in the representation proceeding then pending before the Board. Respondent's efforts to forestall a fair determination of the question by its coercive interrogation of its employees and by its grant of benefits, that is, by "settl[ing] unilaterally a matter with respect to which the employees had appropriately requested collective bargaining" (*N. L. R. B.* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. A. 3)), a "matter no longer to be determined unilaterally by the employer" (*Singer Mfg. Co.* v. *N. L. R. B.*, 119 F. 2d 131, 137 (C. A. 7), certiorari denied, 313 U. S. 595), demonstrate that the question of the Union's majority "was not a moving factor in the difficulties" (*Idaho Potato Growers* case, *supra*, at 307–308), but "merely cloaked a determination not to yield [the Union] bargaining rights under any circumstances" (*N. L. R. B.* v. *Morris P. Kirk & Son, Inc.*, 151 F. 2d 490, 492 (C. A. 9)).[11]

Respondent's contention, advanced to the Board, that the Union's majority had been lost by the time

[11] See also, *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225; *N. L. R. B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827; *N. L. R. B.* v. *Ellis-Klatscher & Co.*, 142 F. 2d 356, 358–359 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 245, 247, 248 (C. A. 9); *Idaho Potato Growers* v. *N. L. R. B.*, 144 F. 2d 295, 310, 311 (C. A. 9), certiorari denied, 323 U. S. 769.

the benefits were conferred, lacks merit. The contention rests on the alleged revocation by Employee Guillory of her authorization of the Union to represent her. There was no such revocation. The testimony relied on by respondent in this connection shows at most that Guillory refused to join the Union (R. 144, 163). But this had no effect on her prior authorization of the Union "to represent me and, in my behalf, to negotiate all agreements as to Hours of Labor, Wages, and other Employment Conditions" (R. 80). The courts have uniformly recognized that membership is not essential to the designation of a union for collective bargaining purposes under the Act. *Continental Oil Co.* v. *N. L. R. B.,* 113 F. 2d 473, 480 (C. A. 10), remanded on other grounds, 313 U. S. 212; *Pueblo Gas and Fuel Co.* v. *N. L. R. B.,* 118 F. 2d 304, 307–308 (C. A. 10); cf. *N. L. R. B.* v. *Electric Vacuum Cleaner Co.,* 315 U. S. 685, 691–692; *Brotherhood of Ry & S. Clerks* v. *Virginian Ry. Co.,* 125 F. 2d 853, 855 (C. A. 4); *National Motor Bearing Co.,* 5 NLRB 409, 428, enforced 105 F. 2d 652 (C. A. 9). As the Court stated in the *Continental Oil* case, *supra:* "The instrument indicates clearly a purpose to designate the union as the representative of the employees for the purpose of collective bargaining. * * * And the fact that some of the persons signing it were not members of the union makes no difference. Section 9 (a) * * * does not require that all members of the majority making the selection shall be members of the agency selected. Such a limitation is not to be found

either in the language or fair intendment of the statute."[12]

The Board also held that respondent's grant of benefits constituted an independent violation of Section 8 (a) (5), even without regard to motive (R. 24). This view is well supported by the cases. It follows from the fact that the employer's obligation under the Act is to bargain with the majority representative exclusively, which thus "exacts 'the negative duty to treat with no other.'" *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 683–684, citing *N. L. R. B.* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 44. Not only does "such unilateral action minimize the influence of organized bargaining" (*May Department Stores Co.* v. *N. L. R. B.*, 326 U. S. 376, 385), but "it is a violation of the essential principle of collective bargaining" (*Medo, supra,* at 684). "Clearly to bargain

[12] Even if, *arguendo*, Guillory's action were considered a revocation of her authorization of the Union to bargain for her, there is no evidence as to when it occurred other than "during the month of January 1950," or thereafter (R. 162–163). As this Court has held, a union's majority status "once shown to exist is presumed to continue to exist until the contrary is shown." *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660; accord, *N. L. R. B.* v. *E. C. Atkins & Co.*, 331 U. S. 398, 402; *N. L. R. B.* v. *Harris-Woodson Co.*, 162 F. 2d 97 (C. A. 4), and cases there cited. Absent more specific evidence, the Board was certainly not required to assume that the revocation, if any, occurred before January 25, the date of respondent's wrongful refusal to bargain. If it occurred thereafter, the revocation could, of course, be attributable to respondent's unfair labor practice and hence would not operate to defeat the Union's majority. *Medo Photo Corp.* v. *N. L. R. B.*, 321 U. S. 678, 683–684; *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702, 704; cf. *N. L. R. B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134–135 (C. A. 9), certiorari denied, 338 U. S. 827.

directly with one's employees is not to bargain with their designated exclusive representative." *N. L. R. B.* v. *Highland Shoe, Inc.,* 119 F. 2d 218, 221 (C. A. 1). Consequently, where, as here, bargaining has been requested by the exclusive representative, the unilateral action of the employer, dealing directly with the employees, is a refusal to bargain and "a violation of Section 8 (5) of the Act." *N. L. R. B.* v. *Andrew Jergens Co.,* 175 F. 2d 130, 136 (C. A. 9), certiorari denied, 338 U. S. 827; accord, *N. L. R. B.* v. *Hoppes Mfg. Co.,* 170 F. 2d 962 (C. A. 6); *N. L. R. B.* v. *George P. Pilling & Son Co.,* 119 F. 2d 32, 38 (C. A. 3); *Great Southern Trucking Co.* v. *N. L. R. B.,* 127 F. 2d 180, 186 (C. A. 4), certiorari denied, 317 U. S. 652, and cases there cited.

## III

**The Board properly found that respondent further interfered with, restrained and coerced its employees, in violation of Section 8 (a) (1) of the Act, by threatening to close its San Jose store rather than accede to a union shop**

Respondent first gave notice to its employees that its open shop policy "will not be changed" shortly after it had refused to recognize the Union in late January, and at about the same time as its unilateral announcement of wage and hour benefits for the employees (*supra,* pp. 3–5). Thereafter, and immediately prior to the scheduled election date, Manager Kihs called to the attention of numerous employees the letter in which respondent's attorney stated that "to make assurance doubly sure" he had inquired of a Company official and could reaffirm that it was re-

spondent's "settled * * * policy" and "definite position" that it would never agree to a union shop "under any circumstances" (*supra,* pp. 5–6). Finally, the letter added the open threat that "if we can't do business in San Jose on an open shop basis, we just won't do business in San Jose" (*supra,* p. 6).

The Board correctly found (R. 24) that "by notifying its employees in the way it did that it would never agree to a union shop," respondent "coerced the * * * employees in the exercise of the rights guaranteed by Section 7 of the Act" (R. 26).[13] Respondent's threat to move the plant rather than agree to a union shop, made in a context of antiunion questioning of employees and unilateral granting of benefits, foreclosed the Union in advance of negotiations[14] from bargaining with respect to a matter which the

[13] The only portion of the Board's order here involved is that part of paragraph 1 (b) which directs respondent to cease and desist from engaging in this specific violation (R. 27). The general "in any other manner" provision of paragraph 1 (b) of the order (R. 27–28) is entitled to enforcement on the basis of the other violations alone. *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 685–686; *N. L. R. B.* v. *Grower-Shipper Vegetable Ass'n.* 122 F. 2d 368, 376 (C. A. 9); *N. L. R. B.* v. *Bailey Co.*, 180 F. 2d 278, 280 (C. A. 6); *N. L. R. B.* v. *National Plastic Products Co.*, 175 F. 2d 755, 760 (C. A. 4); *N. L. R. B.* v. *Alco Feed Mills*, 133 F 2d 419, 421 (C. A. 5).

[14] An employer's foreclosing, in advance of negotiations, possible agreement with respect to one or more of the terms and conditions of employment as to which the Act requires him, upon request, to bargain, is a familiar form of unlawful refusal to bargain. *N. L. R. B.* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1005–1006 (C. A. 3); *N. L. R. B.* v. *Somerset Shoe Co.*, 111 F. 2d 681, 688 (C. A. 1); *N. L. R. B.* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (C. A. 3); *N. L. R. B.* v. *Highland Park Mfg. Co.*, 110 F.

statute gave the Union a right to bargain about.[15] Respondent thus deprived the Union of its right to an opportunity to achieve one of the more important and commonly sought union objectives,[16] and one which the statute specifically permits (Section 8 (a)

2d 632, 637–638 (C. A. 4). It is recognized, moreover, that the effect of such conduct by the employer is "to restrain its employees in the exercise of their rights under Section 7 of the Act." The *Westinghouse* case, *supra*, 120 F. 2d, at pp. 1006–1007). See further reference to the Westinghouse case, *infra*, p. 23, n. 19.

[15] It is settled, as this Court has held, that "Union security is properly a 'condition of employment' within the meaning of § 9 (a) of the National Labor Relations Act and hence is within the statutory area of collective bargaining." *N. L. R. B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 133, certiorari denied, 338 U. S. 827; accord *N. L. R. B.* v. *Winona Textile Mills, Inc.*, 160 F. 2d 201, 208 (C. A. 8); *N. L. R. B.* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. A. 3); *Ritzwoller Co.* v. *N. L. R. B.*, 114 F. 2d 432, 435, 436 (C. A. 7). Indeed, it has been held illegal as against the policy of the Act for an employer to condition the making of a contract upon a provision that forecloses the employees from bargaining for union security. *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 882–885 (C. A. 1), certiorari denied, 313 U. S. 595; *N. L. R. B.* v. *American Mfg. Co.*, 106 F. 2d 61, 66–67 (C. A. 2), affirmed, 309 U. S. 629.

[16] During the fiscal year ending June 30, 1950, union-shop contracts were authorized by the employees in 96.2 percent of the polls conducted by the Board. *Fifteenth Annual Report* of the National Labor Relations Board, p. 14. In the previous year, the comparable figure was 96.7 percent. *Fourteenth Annual Report* of the National Labor Relations Board, p. 6. Because such elections "have almost always resulted in a vote favoring the union shop," thus making the mandatory election procedure of Section 8 (a) (3) (ii) "wholly unnecessary" (S. Rep. No. 646, 82d Congress, 1st Session, p. 1; see H. Rept. No. 1082, 82d Congress, 1st Session, pp. 2–3), the Act has recently been amended by abolishing the requirement for such elections. Pub. Law No. 189, approved October 22, 1951.

(3)). The courts have recognized that this very kind of conduct by an employer would tend to discourage employee support for a union by casting doubt upon its efficacy as bargaining agent. In *N. L. R. B.* v. *Elkland Leather Co.*, 114 F. 2d 221, 223, 224 (C. A. 3) certiorari denied, 311 U. S. 705, the court held that the employer's statement "issued at the first indication of Union activity," that he would "always operate as an open shop," " 'was manifestly designed to discourage organizational efforts.' " To the same effect are *N. L. R. B.* v. *Harbison-Walker Refractories Co.*, 135 F. 2d 837, 838 (C. A. 8), and *N. L. R. B.* v. *American Mfg. Co.*, 106 F. 2d 61, 66, 67 (C. A. 2), affirmed, 309 U. S. 629. Cf. *R. R. Donnelley & Sons Co.* v. *N. L. R. B.*, 156 F. 2d 416, 418, 419 (C. A. 7), certiorari denied, 329 U. S. 810; *N. L. R. B.* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 756–757 (C. A. 7).[17]

Preliminary statements by the employer, made in advance of negotiations, that he will not recognize or bargain at all with the union selected by his employees, as this Court has held, "constitute well recognized forms of interference, restraint and coercion in violation of Section 8 (1) of the Act" (*N. L. R. B.* v.

[17] Even those cases not disposed to hold less emphatic declarations of the open shop policy, unaccompanied by threats, to violate Section 8 (a) (1) *per se*, have held or indicated that such statements were unlawful in a milieu of antiunion activity. *Continental Box Co.* v. *N. L. R. B.*, 113 F. 2d 93, 94, 96–97 (C. A. 5); *N. L. R. B.* v. *Blossom Products Corp.*, 121 F. 2d 260, 261 (C. A. 3); *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. 2d 993, 995 (C. A. 2), certiorari denied, 320 U. S. 768; *N. L. R. B.* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 499–500 (C. A. 8).

*J. G. Boswell Co.,* 136 F. 2d 585, 590),[18] just as an actual refusal to bargain at all, while going through the motions of negotiating, constitutes an obvious violation of Section 8 (a) (5). (The *Westinghouse* case, *infra,* n. 19, p. 23.) By the same token an employer's advance announcement, made in a context of other unfair labor practices, that he will not bargain about a particular subject of compulsory bargaining, for instance a union shop, is as clearly coercive of the employee' rights protected by Section 8 (a) (1), as his actual refusal to bargain about such subject, upon request, is a denial of the rights protected by Section 8 (a) (5). The only difference between the two types of statements, like that between the two types of refusal to bargain, is a matter of degree. But in either case discouragement of employee support of the union is engendered by employer pressure in the form of an announcement that he will refuse to accord the union its full bargaining rights under the Act. Where, as here, the announcement is accompanied by a threat of economic loss to the employees—the closing of the store—the coercive nature of the employer's action is the more patent. Cf. *International Association of Machinists* v. *N. L. R. B.,* 311 U. S. 72, 76; *N. L. R. B.* v. *Reeves Rubber Co.,* 153 F. 2d 340, 341 (C. A. 9); *N. L. R. B.* v. *Holtville Ice & Cold Storage Co.,* 148 F. 2d 168, 169 (C. A. 9); *N. L. R. B.* v. *W. E. Lipshutz,* 149 F. 2d 141, 142 (C. A. 5).[19]

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[18] See also, *N. L. R. B.* v. *Montgomery Ward & Co.,* 133 F. 2d 676, 681, 682 (C. A. 9); *N. L. R. B.* v. *Security Warehouse and Cold Storage Co.,* 136 F. 2d 829, 832 (C. A. 9).

[19] The majority of the Board (R. 25–26) distinguished its decision in *M. T. Stevens & Sons Co.,* 68 N. L. R. B. 229, referred to

The circumstance, noted by the dissenting Board member (R. 30), that at the time respondent engaged in the conduct in question the union-shop referendum then required by Section 8 (a) (3) (ii) had not been held, does not detract from the force of the Board's position.[20] The issue here, as the majority observed

by the dissenting Board member (R. 29–31). As the majority pointed out, the *Stevens* case, unlike the instant case, involved neither threats nor any other unfair labor practice, but a mere announcement of the company's open shop policy. Moreover, respondent's brief to the Board (a copy of which is being lodged with the Clerk of the Court for the Court's convenience), stating categorically that "the Respondent does not pretend, however, that there was any prospect of its yielding at the bargaining table" (p. 17), leaves no room for application of the *Stevens* rationale that "a policy, however strongly held, may, and often does, yield at the bargaining table" (68 N. L. R. B. at 230). Cf. *N. L. R. B.* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006–1007 (C. A. 3), holding that where the employer "was at pains to make clear and unmistakable that it would not contract with the union," its participation at bargaining conferences did not save it from an unfair labor practice finding, for "the vanity of bargaining where the employer has foreclosed in advance any possibility of agreement is patent. To say that in such circumstances the employer's participation in the negotiations is for the purpose of bargaining collectively would be to supplant actuality with mere seeming. The very situation renders impossible an exhibition by the employer of the good faith essential to the bargaining function." See also *N. L. R. B.* v. *Somerset Shoe Co.*, 111 F. 2d 681, 688 (C. A. 1).

[20] As already shown, Section 8 (a) (3) (ii) of the Act permitted an employer to make a union-shop agreement with the representative of his employees only after a majority of the employees had voted to authorize the representative to make such an agreement. This requirement was eliminated by the recent amendment of the Act (*supra*, p. 20, n. 16).

(R. 27), is not whether respondent was under an immediate obligation to bargain about a union shop, but whether, by foreclosing the possibility of present or future bargaining about the subject regardless of the obligation, respondent interfered with and coerced its employees in the exercise of their statutory rights. We have shown (*supra,* pp. 18–22) that such conduct constitutes interference and coercion in violation of Section 8 (a) (1) of the Act. Even assuming *arguendo* that respondent had no obligation to bargain about a union shop prior to the Union's winning an authorization election,[21] respondent's anticipatory refusal to bargain would have been no less coercive than a declaration of purpose not to bargain at all made in advance of a union's attaining majority status, or the foreclosing of a written contract before substantive terms have been agreed upon. The *Elkland Leather* case, *supra,* 114 F. 2d at p. 224; the *Westinghouse* case, *supra,* 120 F. 2d at pp. 1006–1007; the *Somerset Shoe* case, *supra,* 111 F. 2d at p. 688; *N. L. R. B.* v. *Todd Co., Inc.,* 173 F. 2d 705, 707 (C. A. 2). Moreover, unless the Act protected the

[21] But cf. *N. L. R. B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134, certiorari denied, 338 U. S. 827, where this Court rejected the employer's contention that the Board's bargaining order, based on a refusal to bargain about a union-security agreement, was unenforceable in the absence of an authorization election. See also, *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 154 (C. A. 7), where the Seventh Circuit stated that "Though Section 8 (a) (3) of the Act requires that a union-shop proposal be approved by a majority of the employees before it can be reduced to a contract, such a proposal is the proper subject of bargaining before the vote is held."

freedom of expression of employee choice in a union-shop election against employer interference, the election itself would have been meaningless. Perforce, such an election under Section 8 (a) (3) (ii) required the same protection that has always been guaranteed to ordinary representation elections under Section 9 (c). *N. L. R. B.* v. *Oregon Worsted Co.,* 96 F. 2d 193, 195 (C. A. 9); *N. L. R. B.* v. *National Plastic Products Co.,* 175 F. 2d 755, 760 (C. A. 4).

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper, and that a decree should issue enforcing the Board's order in full.

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## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151 *et seq.*) are as follows:

* * * * *

### Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

### Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employer in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) by discrimination in regard to hire and tenure of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the rep-

resentative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) the Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency * * *.

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *. In case the evidence is pre-

sented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred * * * for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding * * *. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

The relevant provisions of Public Law 189, 82nd Congress, 1st Session (approved October 22, 1951), further amending the National Labor Relations Act, as amended, are as follows:

* * * * *

(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election had voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

(c) Section 9 (e) of such Act is amended by striking out all of subsections (1) and (2) and inserting in lieu thereof the following: "(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer." Renumber subsection "(3)" as "(2)."

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